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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-530

ROBERT BROWN,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the State of New York Court of Appeals and/or Supreme Court of the State of New York, Ninth and Tenth Judicial Districts

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BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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INTRODUCTION

This brief is submitted by Respondent in opposition to a Petition for a Writ of Certiorari to the Court of Appeals of the State of New York and/or the Appellate Term of the Supreme Court of

the State of New York, Ninth and Tenth Judicial Districts.

OPINIONS BELOW

The opinions rendered by the State Courts have not been reported. However, the Order of the Appellate Term of the Supreme Court, dated April 25, 1975, affirming Petitioner's conviction for Obscenity and the Certificate of the Honorable Lawrence H. Cooke, dated July 7, 1975, denying Petitioner leave to appeal to the New York Court of Appeals are contained in the appendix to the Petition herein.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257, Subdivision 3. Petitioner claims that he has been deprived of his First and Fourteenth Amendment rights under the United States Constitution.

QUESTIONS PRESENTED

1. Do the terms and conditions of Petitioner's probation violate his rights under the First and Fourteenth Amendments?

2. Did the instructions of the Trial Court violate Petitioner's right to due process under the Fourteenth Amendment?

STATUTE INVOLVED

New York Penal Law, Section 235.05, Subdivision 1 provides:

> "A person is guilty of Obscenity when, knowing its content and character, he:
>
> 1. Promotes, or possesses with intent to promote, any obscene material."

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States
Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom

of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Constitution of the United States
Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On March 5, 1969, Detective Irene Felton of the Suffolk County,New York, Police Department was assigned to an undercover investigation of the Overstock Book Company (hereinafter referred to as Overstock) for possible violations of New York's Obscenity Statute (Penal Law, Section 235.05). Overstock is a large scale distributor of various

books and magazines with a warehouse located in Suffolk County, New York.

As part of her investigation, Detective Felton was able to obtain employment at Overstock as a receptionist and clerical worker. During the course of her employment, she had occasion to meet the Petitioner herein, Robert Brown, who was the President of Overstock. She was also able to familiarize herself with the general layout of the warehouse and the different types of publications that were being distributed.

Based upon her investigation, Detective Felton made application for the issuance of a search warrant. On April 17, 1969, a warrant was issued by the Honorable Pierre G. Lundberg of the County Court of Suffolk County and, pursuant thereto, certain books, magazines and slides were seized from the Warehouse which formed the basis of this criminal prosecution against Petitioner.

Petitioner's trial began on November 26, 1973 in the District Court of Suffolk County after numerous pre-trial motions and proceedings had been conducted. After trial, the jury convicted Petitioner of violating the provisions of Penal Law, Section 235.05, Subdivision 1 (promoting obscenity).

On March 7, 1974, Petitioner was fined in the amount of $1000.00 and sentenced to three year's probation by the Honorable Lawrence Newmark. As part of the terms and conditions of his probation, Petitioner was directed to:

> "... avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly."

On April 25, 1975, the Appellate Term of the Supreme Court for the Ninth and Tenth Judicial Districts unanimously affirmed Petitioner's conviction without opinion. Leave to appeal to the New York State Court of Appeals was denied

on July 7, 1975 by the Honorable Lawrence H. Cooke.

POINT ONE

THE TERMS AND CONDITIONS OF PETITIONER'S PROBATION DO NOT VIOLATE HIS RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

On March 7, 1974, Petitioner was fined in the amount of $1000.00 and sentenced to three year's probation. As part of the terms and conditions of his probation, he was directed to:

> "...avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly."

Probation is a privilege and not a right. It has been held to be a matter of grace. Burns v. United States, 287 U.S. 216 (1932); People v. Oskroba, 305 N.Y. 113 (1953). The enjoyment of the privilege is subject to compliance by the probationer with reasonable conditions. These

may include suitable conditions to achieve the purpose of probation; to wit: rehabilitation of the criminal and the protection of the public. People v. Santos, 31 A.D.2d 508 (First Department, 1969); aff'd 25 N.Y.2d 976;cert. den. 397 U.S. 969 .

Implicit in every grant of probation is the requirement that the probationer not commit another crime. People v. Ware, 29 A.D.2d 557 (Second Department, 1967). While on probation, he must "in all respects conduct himself as a law-abiding citizen." Burns v. United States, supra, at page 223.

Petitioner herein has been duly convicted in the State Court of promoting obscenity (Penal Law, Section 235.05, subdivision 1). He has been directed, as part of his probation, to refrain from selling, producing or promoting sexually explicit material. Said restriction is

reasonably related to the Court's legitimate interest in Petitioner's activities and, thus, does not violate his rights under the First Amendment. Birzon v. King, 469 F. 2d 1241, 1243 (2nd Cir. 1972); Porth v. Templar, 453 F. 2d 330, 334 (10th Cir. 1971). Indeed, where a defendant is placed on probation, the State retains a substantial interest in insuring that its rehabilitative goal is not frustrated and that the public is protected from further criminal activity. Birzon v. King, supra.

Petitioner's argument that he could be in violation of the terms of his probation by having a sexually explicit magazine in his home is both untenable and unrealistic - especially when viewed in the light of the Court's decision in Stanley v. Georgia, 394 U.S. 557, 565 (1969). What is obviously prohibited by the terms of Petitioner's probation is his promotion of obscene material in violation of Section 235.05 of the New

York Penal Law. Such material has never been constitutionally protected. Roth v. United States, 354 U.S. 476 (1957). As we indicated above, implicit in every grant of probation is the requirement that the probationer not commit another crime. People v. Ware, supra; Burns v. United States, supra.

Accordingly, it cannot be said that the terms of petitioner's probation are so vague that "men of common intelligence must necessarily guess at its meaning."

POINT TWO

THE TRIAL JUDGE'S INSTRUCTIONS DID NOT DEPRIVE PETITIONER OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

In a comprehensive charge, the Trial Judge carefully discussed the evidence and the law. The jury was instructed that if there was a reasonable doubt that the Petitioner promoted obscenity, then he was entitled to an acquittal.

The jury was also charged that scienter could not be inferred merely from the fact that the material in question was contained in a warehouse where Petitioner worked. The trial judge further charged that the jury must acquit if they determined that the books in evidence were not identical to the ones Detective Felton observed and seized.

To assist the jury in arriving at a verdict, the trial judge proceeded to give examples of conduct declared to be obscene under state law. Since a "state standard" was to be applied in determining the issue of obscenity, the examples were properly given to the jury for its consideration. Miller v. California, 413 U.S. 13, 25 (1973); People v. Heller, 33 N.Y.2d 314, 322 (1974). If error was committed in this regard, and we submit there was no error, it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). As this

Court observed in Hamling v. United States, ____ U.S. ____, 94 S. Ct. 2887, 2901 (1974):

> "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of law."

The trial judge properly charged the jury on the definition of obscenity as set forth in Penal Law, Section 235.00, Subdivision 1. That section provided:

> "Any material or performance is 'obscene' if (a) considered as a whole, its predominate appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its desemination to be designed for children

or other specially susceptible audience." 1

Petitioner now contends that he is entitled to the benefit of any change in the law wrought by the Court's decision in Miller v. California, supra, and that the trial judge should have charged the new obscenity test as enunciated therein. It should be observed, however, that Miller substantially changes the law of obscenity, and as a general proposition, now makes it easier to convict defendants charged with Obscenity. Indeed, the Court specifically recognized the virtual impossibility of proving that material is "utterly without redeeming social value" (413 U.S. at p. 22). The Court, instead, adopted a less stringent standard of proof, to wit: the

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1. This section was subsequently amended by the legislature to bring the law into conformity with Miller v. California, 413 U.S. 15 (1973).

the prosecution need only show that the "work, taken as a whole, lacks serious literary, artistic, political or scientific value" (413 U.S. at pp. 25, 37).

Therefore, to have prosecuted Petitioner under the judicially devised Miller definition of Obscenity and to have instructed the jury on it would have been the equivalent of an ex post facto application of the law. This the due process clause forbids. Boule v. City of Columbia, 378 U.S. 347 (1964); People v. Heller, 33 N.Y.2d 314, 330 (1974).

Therefore it cannot be said that Petitioner's right to due process was violated by the trial judge's instructions to the jury.

CONCLUSION

THE PETITION FOR CERTIORARI
SHOULD BE DENIED

Respectfully submitted,

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Dated: October 30, 1975